Housing and Property Chamber
First-tier Tribunal for Scotland

Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/17/0462

Re: Property at Carbeth Guthrie Estate, Blanefield, Glasgow, Stirlingshire, G63 9AT ("the Property")

Parties:

Ms Alison Kipling, Ms Megan Kipling, The Cottage at Castleton House, Eassie, DD8 1SJ ("the Applicant")

Mr David Trevithick, Mrs Marie Trevithick, Carbeth Guthrie, Blanefield, Glasgow, G63 9AT; Carbeth Guthrie, Blanefield, Glasgow, Stirlingshire, G63 9AT ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that:-

1. **The tenancy deposit of £700.00 paid by the Applicants to the Respondents was a tenancy deposit to which the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations") applies;**
2. **The Respondents failed to pay the said tenancy deposit to the scheme administrator of approved scheme within 30 working days of the beginning of the tenancy on 24 February 2017, in breach of their duty under Regulation 3 of the Regulations;**
3. **The Tribunal must order the Respondents to pay the Applicants an amount not exceeding three times the amount of the tenancy deposit; and**
4. **In all of the circumstances, the appropriate sanction is a sum equal to one-half of the tenancy deposit, being the sum of THREE HUNDRED AND FIFTY POUNDS (£350.00) STERLING, and accordingly orders that the Respondents make payment to the Applicants in that sum.**

STATEMENT OF REASONS

1. This is an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"), whereby the Applicants contend that they are entitled to an order under Regulation 10 because the Respondents, having received payment of a tenancy deposit from the Applicants, did not pay that tenancy deposit to the scheme administrator of an approved tenancy deposit scheme in breach of their duties under Regulation 3.

2. This case called before me for a Case Management Discussion on 2 February 2018 at 10am. The Applicants both appeared personally. Mrs Marie Trevithick appeared on behalf of both Respondents.

3. The parties agreed the following matters of fact:-

    a. The Respondents are the owners of Carbeth Guthrie Estate;
    b. The main residence on the Estate is a large property split over multiple floors;
    c. The lower ground floor level is known as "The Garden Flat";
    d. The Garden Flat has its own external access doorway;
    e. There is an internal stairwell which ostensibly leads from the ground floor of the main house to the Garden Flat;
    f. There is a doorway at the foot of the stairwell leading to the Garden Flat;
    g. At some point in time, there was erected on the Garden Flat side of the doorway at the foot of the internal stairwell plasterboard coverings, essentially walling up access through that point;
    h. The Applicants had no right of access to the main house;
    i. The Applicants were the tenants of the Garden Flat under and in terms of a tenancy agreement which commenced on 24 February 2017;
    j. On or around 24 February 2017, the Applicants paid £700 to the Respondents as a tenancy deposit;
    k. The Respondents did not pay the tenancy deposit to the scheme administrator of an approved scheme until 2 August 2017;
    l. The Respondents paid the tenancy deposit to the scheme administrator of an approved scheme without prompting from the Applicants, who did not know prior to receipt of notification of payment from SafeDeposits Scotland that the tenancy deposit had not been paid into an approved scheme;
    m. During the tenancy, the parties had no shared living areas;
    n. Council Tax for Carbeth Guthrie House encompasses both the main house and the Garden Flat;
    o. The main house and the Garden Flat are served by a biomass boiler heating system. The main house has an oil powered backup system, which also serves the bedrooms in the Garden Flat; and
    p. The main house and the Garden Flat have separate electricity supplies and circuit boards.

building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part."

12. The Respondents' submission that they were "resident landlords" focussed on the link between the main house and the Garden Flat formed by the stairwell. The disagreement between the parties appeared to be regarding the erection of the plasterboard wall. The Applicants contended that the wall pre-existed the start of the tenancy. The Respondents contended that it did not, and alluded to the possibility that the Applicants had erected it themselves. In the end, it is my view that this decision does not turn on when the wall was erected or by whom. The issue is whether the main house and Garden Flat comprise one "house" within the meaning of the 2004 Act, such that the Respondents would benefit from the exclusion created by section 83(6)(e).

13. It is my view that it is beyond doubt that the Garden Flat is a part of a building occupied, or intended to be occupied, as a dwelling, by which I mean a separate, standalone dwelling. As stated by Lord Hodge in *R(N) v Lewisham London Borough* Council, [2015] A.C. 1259, at paragraph 25 of his judgment, *"The word "dwelling" is not a technical word with a precise scientific meaning. Nor does it have a fixed meaning."* It is a question of fact. At paragraph 29, Lord Hodge continues:-

"Under the Rent Acts when the court considers whether a property is let as a separate dwelling it looks to the purpose of the tenancy. That involves a consideration of both the terms of the contract and the factual matrix of the letting. Thus a tenancy at will is the letting of a "dwelling", notwithstanding the precariousness of the contractual right to occupy, where it is clear that the indeterminate period of authorised occupation is consistent with an intention that the tenant establishes a home in the property."

14. It was common between the parties that there were no shared living arrangements. The clear intention, it appears, was that the parties would live separately from one another, with the main house being the only or principal home of the Respondents, and the Garden Flat being the only or principal home of the Applicants. Whilst there was, it seems, agreement as to circumstances in which the Respondents would require and be allowed access to the Garden Flat (in particular, for access to the electrical circuit boards), such contractual reservations in favour of landlords are commonplace and do not point to any form of shared existence.

15. It is for those reasons that I have determined that the tenancy here is a relevant tenancy for the purposes of Regulation 3, and that the tenancy deposit ought to have been paid into an approved scheme within 30 working days of 24 February 2017.

16. Having reached that decision, and standing the Respondents candid acceptance that it was not so paid into an approved scheme, I am required to consider sanction. Three times the tenancy deposit is the maximum sanction that I may apply but, in determining an appropriate sanction, I must exercise

judicial discretion. As stated by Sheriff Welsh QC in *Jenson v Fappiano,* 2015 SCEDIN 6, judicial discretion:-

"...is always constrained by a number of settled equitable principles.

1. *Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgment.*
2. *The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.*
3. *A decision based on judicial discretion must be fair and just"*

17. I accept the submission by the Respondents that the breach in this case was caused by an unfortunate technical error with regards to processing payment into an approved scheme, compounded by their own oversight. They have, to their credit and notwithstanding their own erroneous belief that the Regulations did not apply to this arrangement, sought to protect the tenancy deposit for the Applicants' benefit. Having discovered, of their own accord, that their attempts to do so had fallen short, they then took proactive steps to remedy the situation and apologised to the Applicants for payment not having been made into an approved scheme within a shorter timescale. That was so notwithstanding the Respondents' own inexperience of residential lettings in Scotland, this tenancy having been the first occasion on which the Respondents had let any property in Scotland.

18. However, the fact remains that the Respondents were in breach and that the tenancy deposit was, in fact, unprotected for a period in excess of five months. I also have sympathy with the submission made by the Applicants that the Regulations place an onus on the landlord to ensure compliance, and that steps ought to have been taken by the Respondents to check the position. Whilst I am cognisant of the reasons stated by the Respondents as reasons for their own oversight, I must say that the Applicants' submission in that respect is correct. That is why the award is "sanction" and not "damages". It serves partially as a deterrent, to prevent other landlords from making the same errors.

19. It is my view, in light of all of these factors, it is my view that an appropriate sanction is a sum equal to one half of the tenancy deposit. Accordingly, I will order that the Respondents make payment to the Applicants in the sum of £350.00.

- The application seeks payment of the expenses. However, I am not satisfied that the Respondents have behaved unreasonably as required by Rule 40 of the Chamber's Rules of Procedure. There was a complex and genuine issue to try in this case, and the Respondents' approach to dealing with that issue was of assistance to the Tribunal. Accordingly, I will make no award of expenses.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

A Upton

2 FEBRUARY 2018

Legal Member/Chair **Date**